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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 736

GWENDOLYN TUCKER,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of Illinois.

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THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of Illinois.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Gwendolyn Tucker, prays that a writ of certiorari issue to review a judgment of the Supreme Court of Illinois affirming a judgment of the Appellate Court for the Second District, which affirmed her conviction in the County Court of Whiteside County of the offense of keeping and maintaining a house of ill fame.

Citations to Opinions Below.

The opinion of the Appellate Court, printed in Appendix B hereto, infra, page 25, is reported in 21 Ill. App. 2d 46, 156 N.E. 2d 873. The opinion of the Supreme Court of Illinois, printed in Appendix C hereto, infra, page 31, is reported in 18 Ill. 2d 103, 163 N.E. 2d 510.

Jurisdiction.

The judgment of the Appellate Court was affirmed on November 18, 1959. A timely petition for rehearing filed on December 2, 1959, was denied on January 18, 1960.

The jurisdiction of this court is invoked under 28 U.S.C. Sec. 1257(3) because a right was specially set up and claimed under the Constitution of the United States.

The federal question sought to be reviewed was raised in the motion for new trial in the court of first instance, and in the assignments of error and petitions for rehearing in the appellate courts.

Question Presented.

Whether the State deprived petitioner of her liberty without due process of law and denied her the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States because she did not have a fair trial.

Statute Involved.

Section 162 of the Illinois Criminal Code is printed in Appendix A hereto, infra, page 23.

Statement of the Case.

This is a criminal prosecution.

The State's Attorney filed on November 25, 1957, in the County Court of Whiteside County, an information against petitioner for the offense of keeping and maintaining a house of ill fame.

The information, in part, alleged:

> "That Gwendolyn Tucker on to-wit: the 4th day of August in the year of our Lord one thousand nine hundred and fifty-seven at and within said County of Whiteside in the State of Illinois did unlawfully and wilfully keep and maintain a house of ill fame and place for the practice of prostitution and lewdness in a building located at 1306 Dillon Avenue, Sterling, Illinois, contrary to the statute", etc.

It was verified by the affidavit of Boyd Kimmel, the Sheriff of said county.

Petitioner was arraigned and furnished with a copy of the information. A motion to quash the information was heard and denied. She entered a plea of not guilty.

The case was tried by a jury. Evidence was introduced by the State in support of the allegations of the information, including the testimony of Homer Gallentine who had pleaded guilty on August 5, 1957, in the same court to the same offense at the same place on the same date. Petitioner introduced evidence in defense, including her defense of alibi which was not disputed.

Petitioner, a widow, resided at 522 Wallace Street, Sterling, Illinois, where she had made her home since 1948. (Abst. 42.) She furnished board and room to others after her husband passed away in 1953. (Abst. 43.)

James Hawthorne rented the house at 1306 Dillon Avenue from Martin Anderson, of Dixon, Illinois, about April 15, 1957. He then moved there. (Abst. 39.) It was not in the City of Sterling. (Abst. 28.) He paid the rent to the landlord. (Abst. 39.) He had a telephone in his name. (Abst. 51.) He owned the furniture which he sold to another person on August 9, 1957. (Abst. 41.) He was still renting the house on August 4, 1957. (Abst. 39.)

His caretaker, Homer Gallentine, and three women were arrested there by the Sheriff early on August 4, 1957. At the time he entered, one woman was watching television in the living room, another was standing in a bedroom with a man, and the third was asleep in her bedroom. (Abst. 28, 29, 30.)

On August 5, 1957, Homer Gallentine pleaded guilty in the County Court of Whiteside County to the offense of keeping and maintaining a house of ill fame on August 4, 1957, and was sentenced to the Illinois State Farm for a term of one year. (Abst. 37.) He was allowed to testify, over objection, to alleged acts of the inmates. He said that the girls took men to bed (Abst. 35), but he admitted on cross examination that he did not see anything that may have occurred in their bedrooms. (Abst. 37.) He also said that petitioner had asked him to stay there (Abst. 36), but she denied that he was employed by her.

Petitioner did not own or rent the house at 1306 Dillon Avenue. She had not had it in her possession, nor had she lived in it at any time. (Abst. 42.) No one there was employed by her. (Abst. 43.) She had nothing to do with the management or control of the house. (Abst. 42.) She was in California on August 3, 1957. Her sister was ill and she remained there with her about two weeks. She also had no knowledge of the unlawful use, if any, of the

house while she was in Sterling or away from it. (Abst. 43.) She did not receive any money from it.

Motions for a directed verdict, at the close of the State's case and at the close of all the evidence, were heard and denied.

In its verdict the jury found petitioner "guilty of keeping and maintaining a house of ill fame, in manner and form as charged in the information," and fixed her punishment at a fine of $200.00 and six months confinement in the County Jail.

Motions for a new trial and in arrest of judgment were heard and denied.

Petitioner on February 11, 1958, was sentenced in accordance with the verdict. However, the issuance of a mittimus was stayed.

She sued out a writ of error from the Appellate Court to review the judgment of conviction. The writ of error was made a supersedeas. The judgment of the County Court of Whiteside County was affirmed on March 3, 1959. A rehearing was denied on March 31, 1959.

She then sued out a writ of error from the Supreme Court of Illinois to review the judgment of the Appellate Court. It was affirmed on November 18, 1959. A rehearing was denied on January 18, 1960.

Reasons for Granting the Writ.

1. The information is fatally defective.

An intelligent and full understanding by the accused of the accusation against him is the first requirement of due process of law. To afford due process of law an in-

dictment or information must fairly inform him of the charge against him and contain a statement of the acts which constitute the offense with reasonable definiteness and certainty so as to advise the accused of what he has to meet and give him a fa[redacted]easonable opportunity to prepare his defense and enable him to plead the judgment in bar of another prosecution for the same offense.

The Illinois Criminal Code provides that every indictment or accusation of the grand jury shall be deemed sufficiently technical and correct which states the offense in the terms and language of the statute creating the offense, or so plainly that the nature of the offense may be easily understood by the jury. (Ill. Rev. Stat. 1957, Chap. 38, Sec. 716.)

Every information shall set forth the offense with reasonable certainty, substantially as required in an indictment. (Ill. Rev. Stat. 1957, Chap. 37, Sec. 289.)

Notwithstanding these provisions of the statutes, the courts below repeatedly have held that a charge in an indictment or information, even though in the language of the statute creating the offense, is not sufficiently specific and definite unless the statute, in creating the offense, particularly defines or describes the act or acts constituting the offense, so that the charge may be easily understood.

The law requires such certainty in an indictment or information that the defendant may know with what he is charged, and be able to prepare his defense, and also to identify the offense sufficiently so that the judgment may be shown in a plea of former acquittal or conviction. (*People* v. *Ostrowski*, 334 Ill. App. 494, aff. 402 Ill. 106; *People* v. *Ellis*, 185 Ill. App. 417.)

Generally, it is sufficient in an indictment or information to state the offense in the language of the statute in those cases where the statute clearly defines or describes the offense. (*Gallagher* v. *People*, 211 Ill. App. 158; *Brennan* v. *People*, 113 Ill. App. 361.) Where the statute, however, does not define or describe the act or acts constituting the offense, such acts must be specifically alleged. (*People* v. *Peters*, 10 Ill. 2d 577; *People* v. *Potter*, 5 Ill. 2d 365; *People* v. *Chiafreddo*, 381 Ill. 214; *People* v. *Green*, 368 Ill. 242; *People* v. *Brown*, 336 Ill. 257; *People* v. *Lewis*, 319 Ill. 154; *People* v. *Barnes*, 314 Ill. 140; *Johnson* v. *People*, 113 Ill. 99.)

The statute creating the offense alleged in the information is, in part, as follows:

> "Whoever keeps and maintains a house of ill fame or place for the practice of prostitution or lewdness, * * * shall be fined not exceeding two hundred dollars, or imprisoned in the county jail or house of correction for a period of not more than one year or both."

In a criminal prosecution based thereon, the accusation must allege the following:

First, the offense is a continuing offense. It must be alleged with a continuando. (*State* v. *Fogg*, 107 Me. 177, 77 A. 714.) An allegation that the house was kept or maintained on a single day, as it was in this case, is insufficient. It is necessary to allege the keeping or maintaining on a day certain and on divers days prior and subsequent thereto.

Second, it must allege that the accused kept or maintained the house, or that he aided, abetted or assisted, or not being present, advised, encouraged, aided or abetted the commission of the offense.

Third, it must allege that the house was a house of ill fame or place for the practice of prostitution or lewdness.

Fourth, it must allege the act or acts of prostitution or lewdness.

Fifth, it must allege that the act or acts were done with the knowledge or consent of the accused.

Sixth, it must allege that the persons who frequented or resorted to the house were evil disposed persons of both sexes. (*State* v. *Evans*, 27 N. C. 603.)

Seventh, it must allege the names of the frequenters or inmates of the house.

Clearly, it is not sufficient to allege the offense in the language of the statute as it was done in this case. Facts and not conclusions must be alleged. The information, however, does not allege any facts. It is vague, indefinite and uncertain. The trial court should have quashed it.

The case of *People* v. *Russell*, 337 Ill. App. 665, cited by the Appellate Court, is not in point. The questions here raised were not raised in such case or decided by the Appellate Court or the Supreme Court of Illinois.

An accused has a constitutional right to demand the nature and cause of the accusation against him. It is not a technical right but it is fundamental and essential to the guaranty of due process of law. Illinois has deprived petitioner of her liberty without due process of law in violation of the Fourteenth Amendment.

2. The trial court erred in the admission of evidence.

(a) The trial court erred in admitting hearsay evidence.

The law of conspiracy is not applicable to the case.

A conspiracy is a combination or agreement of two or more persons by some concert of action to do an unlawful act or to do a lawful act by criminal or unlawful means. The mere knowledge, acquiescence, approval or attempt to commit such act, without cooperation or agreement to cooperate, is not sufficient to constitute one a party to a conspiracy. (*People* v. *Bain*, 359 Ill. 455, rev. 274 Ill. App. 215, *People* v. *Bain*, 358 Ill. 177.) There must be an intentional participation in the transaction with a view to the furtherance of the common design or purpose.

Where it appears that two or more persons have conspired to commit an offense, the acts or declarations of one of them, during the existence of the conspiracy, and in the execution or furtherance of the common design or purpose are admissible in evidence against the others. It is not necessary that the indictment or information charged a conspiracy, but, where, although no conspiracy was charged, it is made to appear that there was concerted action between co-conspirators, the acts or declarations of one are admissible against the other.

In order that the acts or declarations of an alleged conspirator may be admissible against an alleged co-conspirator the existence of the conspiracy must be established. It also must be established that the defendant against whom the evidence is offered was a party to such conspiracy. The proof of the existence of the conspiracy should precede any proof of the acts or declarations of the alleged co-conspirators of the defendant.

It is not necessary that the existence of the conspiracy should be established by direct evidence, but proof of circumstances from which the existence of the conspiracy fairly may be inferred is sufficient to let in the evidence of the acts or declarations of one conspirator against another. There must, however, be proof of a conspiracy apart from the acts or declarations of the alleged conspirators. In addition, such acts or declarations are not admissible on the issue of the existence of the conspiracy.

Any evidence which properly tends to show the existence of a conspiracy is admissible, such as the relationship or association of the defendant with the person whose acts or declarations it is sought to show, the presence of such persons at the time and place where the offense was committed, statements made by conspirators, declarations of the defendant tending to show the existence of a conspiracy, and overt acts done in carrying out the purpose of the conspiracy. Mere suspicion is not sufficient to establish a conspiracy. (*People* v. *Mulford*, 385 Ill. 48.)

In the order named, Boyd Kimmel, Frances Shelley, Edward Loftus, and Homer Gallentine, testified in support of the allegations of the information. The State failed to produce any of the inmates of the house in question, or any of the persons who frequented or resorted to it. This raises an inference that the testimony would have been unfavorable.

The testimony of the arresting officers relative to the conversations with one Charlene Dennis and other persons on August 4, 1957, out of the presence of petitioner, was not admissible. (Abst. 29, 33.)

The first conversation that Boyd Kimmel, the Sheriff, had was with Charlene Dennis. (Abst. 29.) He said to her,

"Let's go to bed." She said, "Not me, I am not working tonight. You will have to wait for one of the other girls." He said, "Where are the other girls." She said, "They are both busy. They will be out in a few minutes."

No conspiracy had been established, nor was it established that petitioner was a party to a conspiracy. Where a conspiracy is not established, the acts or declarations of the alleged co-conspirators are not admissible. Not only was the testimony relative to the conversation hearsay, but it constituted entrapment by a law enforcement officer. The State induced the alleged offense. The obstacle to the prosecution lies in the fact that it was instigated by the officer. The State may not provoke or create a crime, and then punish the criminal, its creature. This prosecution should have been stopped in order to protect the State from the illegal conduct of its officers and to preserve the purity of the courts. The trial court should not have admitted the evidence. It was reversible error.

The cases of *People* v. *Williams*, 6 Ill. App. 2d 235, affirmed 8 Ill. 2d 140, and *People* v. *Levin*, 292 Ill. App. 413, cited by the Appellate Court, are not in point.

Clearly, the conviction was obtained by evidence which violates the Due Process Clause of the Fourteenth Amendment.

(b) The State was estopped in the introduction of any evidence prior to August 5, 1957, by the judgment which it obtained against Homer Gallentine on said date in the same court on a plea of guilty to the same offense at the same place on the same date.

Homer Gallentine was arrested by Boyd Kimmel, the Sheriff of Whiteside County, early on August 4, 1957, at 1306 Dillon Avenue, Sterling, Illinois. The State's Attorney filed on August 5, 1957, in the County Court of said

county, an information against him for the offense of keeping and maintaining a house of ill fame which was verified by the affidavit of Boyd Kimmel. He pleaded guilty and was sentenced to the Illinois State Farm for a term of one year.

Objection was made to the introduction of any evidence prior to August 5, 1957, because the State was estopped by the judgment which it obtained against Homer Gallentine on that date in the County Court on a plea of guilty to the same offense at the same place on the same date, but it was overruled and the witnesses were allowed to testify.

The judgment and record were a bar to the introduction of any evidence. The evidence was not admissible. The trial court should have stricken the same.

In any event, Homer Gallentine, who admitted at the trial that he kept and maintained the house in question, should not have been allowed to testify to any facts inconsistent with or contradictory of the record. He was estopped by it. His testimony also was false.

Where a conviction is obtained by the use of testimony known by the State to be false, the constitutional requirement of due process of law is not satisfied. (*Pyle* v. *Kansas*, 317 U. S. 213, 87 L. ed. 214, 63 S. Ct. 177; *Mooney* v. *Holohan*, 294 U. S. 103, 79 L. ed. 791, 55 S. Ct. 340.) To show a denial of due process of law, it is not necessary that the false testimony be concerned directly with the question of guilt. Even though it bears only upon the credibility of a witness, it may have the effect of depriving the accused of a fair trial. Whether such effect is present depends, of course, upon the circumstances of the particular case.

The false testimony used by the State to secure the conviction of petitioner affected the outcome of the trial. (*Napue* v. *Illinois*, 360 U. S. 264, 3 L. ed. 2d 1217, 79 S. Ct. 1173.) Accordingly, the judgment below should be reversed.

(c) The trial court erred in admitting incompetent evidence.

Homer Gallentine was allowed to testify, over objection, to alleged acts of the inmates. He said that the girls came there, took men to bed, and got money from them (Abst. 35), but he admitted, on cross examination, that he did not see anything that may have occurred in their bedrooms, nor did he know if anything occurred in them. (Abst. 37.) He was not corroborated by the testimony of the girls or any other person.

The testimony relative to separate and distinct offenses by other persons, which it was claimed occurred prior to the date alleged in the information, was not admissible. In the first place, the offense was not committed by petitioner or in her presence, nor was it shown that she had any knowledge relative thereto. It also was not shown that she had anything to do with the management or control of the house.

The remoteness in point of time should have excluded the testimony.

It was reversible error.

Due process of law was denied by the admission of the evidence.

(d) The trial court erred in admitting improper evidence in rebuttal.

Evidence was introduced by the State in rebuttal but it related to immaterial matters, such as an ironing board and an alleged conversation with petitioner on June 24, 1957. (Abst. 47-52.) The admission of the evidence was highly prejudicial to petitioner. It was reversible error.

3. There is no proof of the corpus delicti.

(a) There was no proof that petitioner kept or maintained the house in question.

James Hawthorne rented the house at 1306 Dillon Avenue, Sterling, Illinois, from Martin Anderson, of Dixon, Illinois, about April 15, 1957. He then moved there. It was not in the City of Sterling. He paid the rent to the landlord. He had a telephone in his name. He owned the furniture in the house which he sold to another person on August 9, 1957. He was still renting the house on August 4, 1957.

Petitioner did not own or rent the house. She had not had it in her possession, nor had she lived in it at any time. No one there was employed by her. She had nothing to do with the management or control of the house. She was in California on August 3, 1957. Her sister was ill and she remained there with her about two weeks. She also had no knowledge of the unlawful use, if any, of the house while she was in Sterling or away from it. She did not receive any money from it.

It was James Hawthorne that kept or maintained the house, and not petitioner. She had nothing to do with it.

Not only is there no proof that petitioner kept or maintained the house in question, but there is no proof that she aided, abetted or assisted, or not being present, advised, encouraged, aided or abetted the commission of the offense.

The case of *People* v. *Flagg*, 18 Ill. App. 2d 548, is in point. It is decisive of the case. It was not cited by petitioner in the Appellate Court, but it was cited in the Supreme Court of Illinois.

(b) There is no proof that the house was in fact a house of ill fame or place for the practice of prostitution or lewdness.

A house of ill fame or place for the practice of prostitution or lewdness is a house where women prostitute themselves by offering their bodies to an indiscriminate intercourse with men (*People* v. *Ryberg*, 287 Ill. 195, *People* v. *Rice*, 277 Ill. 521.) It is not defined, however, in the statute.

In a criminal prosecution for keeping or maintaining such a house, the State may prove the general reputation of the inmates and of those resorting thereto. (*People* v. *Berger*, 284 Ill. 47.) The reputation of the house is not directly at issue, although evidence of its reputation might be admissible to corroborate either element, that the house is a house of prostitution or that the defendant is knowingly its keeper. (*People* v. *Flagg*, 18 Ill. App. 2d 548.) Evidence of a single act of illicit sexual intercourse, however, is not sufficient to constitute a house a house of ill fame or place for the practice of prostitution or lewdness. (*People* v. *True*, 235 Ill. App. 349.) It is also not sufficient to prove the general reputation of the house or the inmates. (*Pirkle* v. *State*, 68 Ga. App. 52, 22 S.E. 2d 104; *Ramey* v. *State*, 39 Tex. Cr. R. 200, 45 S.W. 489.)

There is no proof of the general reputation of the inmates of the house in question or of those frequenting or resorting thereto. There is no proof of the general reputation of the house. (*Stewart* v. *State*, 83 Okl. Cr. 195,

174 P. 2d 926.) There is no proof of a single act of illicit sexual intercourse, or any immoral or indecent conduct.

Clearly, the house in question was not in fact a house of ill fame or place for the practice of prostitution or lewdness.

The case of *People* v. *True*, supra, is in point. It is decisive of the case.

4. The evidence failed to prove the guilt of petitioner beyond a reasonable doubt.

In a case where an accused is charged with the offense of keeping or maintaining a house of ill fame or place for the practice of prostitution or lewdness, it is necessary for the State to prove by competent evidence beyond a reasonable doubt the following essential elements of the offense:

First, that the accused kept or maintained the house in question.

Second, that the house was in fact a house of ill fame or place for the practice of prostitution or lewdness.

The record discloses that the State failed to prove these essential elements of the offense by competent evidence beyond a reasonable doubt. The failure to prove a material allegation of an indictment or information beyond a reasonable doubt is fatal to a conviction. (*People* v. *Walker*, 7 Ill. 2d 158; *People* v. *Cohen*, 352 Ill. 380.)

The trial court should have granted the motion for a directed verdict or a new trial.

5. The trial court erred in giving to the jury an improper instruction tendered by the State.

(a) Instruction No. 4 relative to circumstantial evidence should not have been given. (Abst. 11).

It was not applicable to the case, and was misleading.

The evidence in the case tending to show the guilt of petitioner was direct evidence. However, the trial court gave an instruction relative to circumstantial evidence. The giving of the instruction was tantamount to telling the jury that there was circumstantial evidence in the case sufficient to warrant a conviction. (*People* v. *Braidman*, 323 Ill. 37.) Considering the state of the evidence, the error in giving the instruction is of too grave a character to be able to say that petitioner was not prejudiced by it. (*People* v. *Ambach*, 247 Ill. 451.) It was reversible. (*Kevern* v. *People*, 224 Ill. 170; *Cunningham* v. *People*, 210 Ill. 410.)

The cases of *People* v. *Berger*, 284 Ill. 47, and *People* v. *Williams*, 6 Ill. App. 2d 325, cited by the Appellate Court, are not in point.

The giving of the instruction constitutes a denial of due process of law.

6. The trial court erred in refusing to give to the jury proper instructions tendered by petitioner.

(a) Instructions Nos. 19 and 20 relative to the defense of alibi should have been given. (Abst. 17, 18)

They were applicable to the case.

At the time that the alleged offense was committed, petitioner was in the State of California. Her absence is a complete defense. She was entitled to have the jury in-

structed relative to the defense of alibi. (*People* v. *Scott*, 401 Ill. 80.) It was reversible error.

The refusal of these instructions constitutes a denial of due process of law.

7. The evidence is insufficient to sustain the conviction.

To sustain a conviction, the evidence must establish that the accused kept or maintained the house in question, and that the house was in fact a house of ill fame or place for the practice of prostitution or lewdness.

It is well settled that a single act of prostitution is not sufficient to constitute a house a house of ill fame or place for the practice of prostitution or lewdness.

There is no proof that on the date in question or on any other date any person had illicit sexual intercourse with another person in the house in question. Even though there had been proof of a single act of prostitution, it would not have been sufficient to sustain a conviction. (*People* v. *Buchanan*, 1 Idaho 681; *People* v. *True*, 235 Ill. App. 349; *Ward* v. *State*, 14 Ga. App. 110, 80 S.E. 295; *Linebarker* v. *State*, 74 Ga. App. 871, 39 S.E. 2d 730; *People* v. *Gastro*, 75 Mich. 133, 42 N.W. 937; *State* v. *Powers*, Mo. App. 176 S.W. 2d 293; *State* v. *Hansen*, Ohio App. 113 N.E. 2d 99; *Hardman* v. *State*, 100 Tex. Cr. R. 358, 273 S.W. 584; *Gibson* v. *State*, 144 Tex. Cr. R. 263, 162 S.W. 2d 703; *State* v. *Crummitt*, 129 W. Va. 366, 40 S.E. 2d 852.)

Little more than a suspicion of guilt was raised by the evidence in this case. The want of evidence is fatal to the judgment of conviction.

Homer Gallentine was an admitted accomplice. The testimony of an accomplice, though competent, is subject to grave suspicion and should be acted on with great caution. A conviction based on the uncorroborated testimony of an admitted accomplice is void unless the record is substantially free from prejudicial error. (*People* v. *Karatz*, 365 Ill. 255.) The evidence as a whole was not sufficient to prove the guilt of petitioner beyond a reasonable doubt.

Clearly, petitioner was deprived of her liberty without due process of law in violation of the Fourteenth Amendment. She was also denied the equal protection of the law. So viewed, the judgment of conviction in this case cannot stand.

8. The verdict is insufficient.

In its verdict the jury found petitioner "guilty of keeping and maintaining a house of ill fame, in manner and form as charged in the information", and fixed her punishment. The information, however, alleged that the defendant on August 4, 1957, did unlawfully and wilfully keep and maintain a house of ill fame and place for the practice of prostitution and lewdness in a building located at 1306 Dillon Avenue, Sterling, Illinois.

A verdict must be responsive to and cover the offense alleged in the information, but it failed to do so in this case. The judgment must also be responsive to the offense alleged, and to the verdict, and must fix the punishment.

The trial court could not legally enter judgment and sentence against petitioner on the verdict of the jury.

9. The punishment fixed by the jury is excessive.

Although the punishment is within the limits of the statute, it is, in view of the evidence, excessive. (*People* v. *Sweetland*, 210 Ill. App. 432.)

Clearly, the verdict is the result of the passion, bias and the prejudice of the jury against petitioner. She did not have a fair trial by an impartial jury.

Conclusion.

This case involves a substantial federal question, the right to a fair trial. It is the greatest human right that an accused has.

In the proceedings which resulted in the conviction of petitioner, there was a substantial denial of her constitutional rights. She did not have a fair trial by an impartial jury. Illinois has deprived her of her liberty without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States. It also denied her the equal protection of the laws.

Petitioner had a constitutional right to have her conviction reviewed by the Supreme Court of Illinois. (Const. of Ill., Art. VI, Sec. 11.) In the decision of cases submitted to it, the opinions of the justices shall be delivered in writing and filed with the other papers. (Ill. Rev. Stat. 1959, Chap. 37, Sec. 21.) The court below should not have been content to follow its action in the two cases cited and simply adopt the opinion of the Appellate Court as its opinion. In the first place, the Appellate Court has not correctly decided the case. The decision is not supported by the record. The Appellate Court has also cited cases which are not in point and has not followed the cases cited which are decisive of the case. The court below should

have prepared and delivered its own opinion. It should have considered and discussed all the errors relied upon for reversal and reached its own conclusions relative thereto. If this had been done, the court below would not allow the decision of the Appellate Court to stand.

In order that justice may be done, this court should take jurisdiction. It is the last hope of petitioner.

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN R. SNIVELY,
Counsel for Petitioner.

APPENDIX.

A.

Statute.

An Act to revise the law in relation to criminal jurisprudence. (Approved March 27, 1874. R. S. 1874, p. 348.)

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

Section 162: Whoever keeps or maintains a house of ill fame or place for the practice of prostitution or lewdness, or whoever patronizes the same, or lets any house, room or other premises for any such purpose, or shall keep a common ill-governed and disorderly house, to the encouragement of idleness, gaming, drinking, fornication or other misbehavior, shall be fined not exceeding two hundred dollars, or imprisoned in the county jail or house of correction for a period of not more than one year or both. When the lessee or keeper of a dwelling house or other building is convicted under this section, the lease for contract for letting the premises shall, at the option of the lessor, become void, and the lessor may have the like remedy to recover the possession as against a tenant holding over after the expiration of his term. And whoever shall lease to another any house, room, or other premises, in whole or in part, for any of the uses or purposes punishable under this section, or knowingly permits the same to be so used or occupied, shall be fined not

exceeding two hundred dollars, or imprisoned in the county jail or house of correction for a period of not more than one year, or both, and the house or premises so leased, occupied or used shall be held liable for and be sold for any judgment obtained under this section, but if such building or premises belongs to a minor or other person under guardianship, then the guardian or conservator and his property shall be liable instead of such ward, and his property shall be subject to be sold for the payment of said judgment.

Ill. Rev. Stat. 1957, Chap. 38, Sec. 162.

B.

Opinion of the Appellate Court of Illinois.

SECOND DISTRICT, FIRST DIVISION
March 3, 1959.

Rehearing Denied March 31, 1959.
21 Ill. App. 2d 46, 156 N.E. 2d 873.

McNeal, J.

By this writ of error the defendant, Gwendolyn Tucker, seeks to reverse a judgment and sentence entered by the County Court of Whiteside County on the verdict of a jury finding her guilty of the offense of keeping and maintaining a house of ill fame.

Defendant contends that the trial court erred in denying her motion to quash the information and in entering judgment on an insufficient verdict. The substance of the information is that the defendant on the 4th day of August, 1957, "did unlawfully and wilfully keep and maintain a house of ill fame and place for the practice of prostitution and lewdness in a building located at 1306 Dillon Avenue, Sterling, Illinois, contrary to the statute", etc. The verdict returned by the jury reads: "We, the jury, find the defendant, Gwendolyn Tucker, guilty of keeping and maintaining a house of ill fame, in manner and form as charged in the information, and we fix her punishment at a fine of Two Hundred Dollars and six months confinement in the County Jail. And we further find from the evidence that the said defendant, Gwendolyn Tucker, is now about the age of 46 years."

In *People* v. *Russell,* 337 Ill. App. 665, 86 N.E. 2d 588, (Abst.), the defendant was charged with keeping a house

of ill fame and with maintaining a place for the practice of prostitution and lewdness. The defendant contended that the information was vague and insufficient and did not apprise her of the offense charged. The Court said: "The information is in the language of the statute, which is sufficient. It sets forth in particularity the date of the offense, the description and address of the house alleged to have been maintained by the defendant on the date in question, and any acquittal on the charges laid would most certainly bar any future prosecution for the same offense." In that case the Court also said that "a finding of 'guilty of keeping a house of ill fame as charged in the information here' is entirely proper." In the instant case the information is in the language of the statute (Par. 162, Ch. 38, Ill. Rev. Stat. 1957). The information and the verdict are sufficient and the trial court committed no error in denying defendant's oral motion to quash or by entering judgment and sentence against defendant on the verdict returned by the jury.

Defendant next urges that the trial court erred in admitting testimony relative to conversations with other persons out of the presence of the defendant. Sheriff Boyd Kimmel and Deputy Edward Loftus testified that they were at the house on Dillon Avenue about 1:00 A.M. on August 4, 1957. Sheriff Kimmel knocked on the door. The door was opened and Homer Gallentine said: "Come in, boys." They walked through the kitchen and into the living room, where Charlene Dennis was sitting on a studio couch. She said: "I am not working tonight. You will have to wait for one of the other girls. * * * They are both busy. They will be out in a few minutes."

(Opinion)

In *People* v. *Williams*, 6 Ill. App. 2d 325, 336, affirmed 8 Ill. 2d 140, it was charged that defendant kept and maintained a house of ill fame. After reviewing evidence similar to that shown in the record here, the Court said: "All of this evidences a conspiracy of plaintiff in error and his wife and the two girls to conduct and operate a house of ill fame. * * * It is well established that where a conspiracy exists to violate criminal laws, all conversations between co-conspirators in carrying out the unlawful act or acts are admissible against the party on trial, even though made out of his presence. This is true notwithstanding the indictment did not charge a conspiracy." In *People* v. *Levin*, 292 Ill. App. 413, 418, the Court said that such conversations with the inmates of a house of prostitution out of the presence of the defendant were competent to show the character of the house. The testimony of Officers Kimmel and Loftus relative to conversations out of the defendant's presence was properly admitted.

The Sheriff and his deputy testified further that they went into a bedroom and there found a man and woman, known as Ginger Lane. She was barefoot and wore a kimona. The man jumped or dove out of the window. Other witnesses testified that defendant rented the house and paid the rent.

Homer Gallentine, aged 77 years, testified that he had known defendant for 20 years. She resided at 522 Wallace Street and rented the house at 1306 Dillon Avenue. At times he stayed at defendant's residence and for about two months he had lived at the house on Dillon Avenue. Defendant took him there in a car. He mowed the grass and took care of work around the house. On August 4 there

were three girls there. They took men to bed, got money from the men, and gave money to defendant. On cross examination Gallentine testified that he was arrested, and on August 5 entered a plea of guilty to an information which charged that on August 4 he kept and maintained a house of ill fame at 1306 Dillon Avenue. Defendant contends that the People were estopped from introducing any evidence pertaining to her offenses prior to August 5 by the judgment obtained against Gallentine on that date. We think not. Both were keeping and maintaining a house, the defendant as principal, and Gallentine as her resident agent.

The record in *People* v. *Tucker*, 18 Ill. App. 2d 546, 152 N.E. 2d 607 (Abst.), discloses that this Court affirmed a decree entered by the Circuit Court of Whiteside County on March 11, 1957, perpetually restraining and enjoining Mrs. Tucker from maintaining a house or other place for the purpose of prostitution anywhere within the jurisdiction of that court, and also from using the house at 522 Wallace Street for any purpose for a period of one year. We have carefully reviewed the evidence in the record before us and are satisfied that the evidence proves beyond a reasonable doubt that the defendant also kept and maintained the house on Dillon Avenue and that it was in fact a house of ill fame. The trial court properly denied defendant's motions for a directed verdict.

Defendant also complains that the trial court erred in giving an instruction on circumstantial evidence for the People and by refusing her instruction pertaining to alibi. In a prosecution for keeping and maintaining a house of ill fame, defendant's guilt may be shown either by direct

evidence, which in most cases of this character is impossible or impracticable, or by circumstances from which according to the rule of common sense and reason guilt is inferable. *People* v. *Berger*, 284 Ill. 47, 50, 119 N.E. 975; *People* v. *Williams*, 6 Ill. App. 2d 325, 340. Defendant's tendered instruction 19 reads in part, "that one of the defenses in this case is what is known in law as an alibi, that is, that the defendant was at another place at the time that the alleged offense was committed, and therefore could not have committed it." Defendant's tendered instruction 20 reads in part, "that when a person who was not at the place where an offense was committed at the time of its commission is later charged with having been present and having committed such offense, her absence from the scene of the offense, if proved, is a complete defense which we call an alibi." Neither of these instructions was applicable to the offense charged in this case. Her absence from the premises on the night in question constituted neither a defense nor an alibi. The court properly gave the instruction on circumstantial evidence offered by the prosecution, and properly refused defendant's instructions on alibi. The court gave twenty of twenty-four instructions tendered by defendant, and five of only six offered by the prosecution. The instructions given for the People were proper, and the jury was amply instructed on every defense available to defendant under the evidence in this case.

In all cases where the penalty as prescribed by statute is confinement in the county jail, or fine, or both, if the jury finds the accused guilty, the jury shall also fix the time of confinement, or fine, or both, as the case in its judgment requires. Par. 754a (b), Ch. 38, Ill. Rev. Stat.

1957. The fine and confinement fixed by the jury in this case are within the provisions of the statute creating the offense and are not excessive. *People* v. *Smith,* 275 Ill. App. 199, 205.

We have reviewed all of defendant's many assertions of error and fail to find merit in any of them. The judgment of the County Court of Whiteside County is therefore affirmed.

Affirmed.

SPIVEY, P. J., and DOVE, J., concur.

C.

Opinion of the Supreme Court of Illinois.

November 18, 1959.
Rehearing Denied January 18, 1960.
18 Ill. 2d 103, 163 N.E. 2d 510.

Mr. Justice Klingbiel delivered the opinion of the court:

By information filed in the county court of Whiteside County Gwendolyn Tucker was charged with keeping a house of ill fame. After trial by jury she was found guilty as charged, and punishment was fixed at a fine of $200 and confinement in the county jail for six months. Upon review by the Appellate Court for the Second District the judgment was affirmed. (21 Ill. App. 2d 46.) Defendant has prosecuted a writ of error from this court for further review.

To reverse the judgment defendant contends that the information was not sufficiently definite to enable her to prepare a defense; that incompetent evidence was admitted; that the evidence is insufficient to prove guilt beyond a reasonable doubt; that error was committed in giving and refusing instructions; and that the punishment is excessive. We have reviewed each of the points raised by defendant, and upon examination of the record find merit in none of them. The reasons and authorities are set forth in the opinion of the Appellate Court, which adequately considered and disposed of the same contentions; and where such is the case it is unnecessary for this court to discuss them again. *People* v. *Williams*, 8 Ill. 2d 140; *People* v. *Lackaye*, 1 Ill. 2d 618.) We accordingly adopt the opinion of the Appellate Court as the opinion of this court. Its judgment being correct it is hereby affirmed.

Judgment Affirmed.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 736

GWENDOLYN TUCKER,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR REHEARING.

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PETITION FOR REHEARING.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Gwendolyn Tucker, prays that this Court grant a rehearing of its order of April 18, 1960, denying the petition for writ of certiorari, and that a writ of certiorari issue to review the judgment of the Supreme Court of Illinois in the above entitled case as prayed in the petition filed on February 26, 1960, herein.

The Constitution of the State of Illinois provides:

> "• • • Appellate Courts • • • may be created • • • from which appeals and writs of error shall lie to the Supreme Court, in all criminal cases • • •."

The statute relating to opinions of the Supreme Court provides:

> "In the decision of cases submitted to the Supreme Court, the opinions of the justices shall be delivered in writing, and filed with the other papers. Such opinions shall also be spread at large upon the records of the court."

Ill. Rev. Stat. 1959, Chap. 37, Sec. 21.

The question not previously presented is whether the State may, consistent with the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States, administer the constitution and statute so as to deny adequate appellate review to petitioner while granting it to others.

Petitioner was convicted by a jury in the County Court of Whiteside County of the offense of keeping and maintaining a house of ill fame. In accordance with the verdict, she was sentenced to pay a fine of $200.00 and to six months confinement in the county jail.

She sued out a writ of error from the Appellate Court to review the judgment of conviction and sentence. The judgment of the County Court of Whiteside County was affirmed.

The opinion was delivered by Mr. Justice Dan H. McNeal, of Moline, Illinois. He is a judge of the Circuit Court of the 14th Judicial Circuit consisting of Henry, Mercer, Rock Island and Whiteside Counties. He was assigned to the Appellate Court by the Supreme Court of Illinois for a three year term.

She then sued out a writ of error from the Supreme Court of Illinois to review the judgment of the Appellate Court. It was affirmed.

The opinion was delivered by Mr. Justice Ray I. Klingbiel, of East Moline, Illinois. He was elected by the Fourth Supreme Judicial District. He has been a judge of the Circuit Court of the 14th Judicial Circuit and had sat in Whiteside County.

The statute is mandatory. It is not satisfied by the adoption of the opinion of the Appellate Court as the opinion of the Supreme Court of Illinois, but it is necessary that the Supreme Court of Illinois shall deliver its own opinion.

The Supreme Court of Illinois should not have been content to follow its action in *People* v. *Williams*, 8 Ill. 2d 140, and *People* v. *Lackaye*, 1 Ill. 2d 618, cited by it and simply adopt the opinion of the Appellate Court as its own opinion. In the first place, the Appellate Court has not correctly decided the case. The decision is not supported by the record. The Appellate Court has cited cases which are not in point and has not followed the cases cited by petitioner which are decisive of the case. The Supreme Court of Illinois should have prepared and delivered its own opinion as it did in *People* v. *Peters*, 10 Ill. 2d 577, reversing 10 Ill. App. 2d 567. It should have considered and discussed all the errors relied upon for reversal and reached its own conclusions. If this had been done, it would not have allowed the decision of the Appellate Court to stand. The judgment of the Appellate Court should have been reversed.

Petitioner has an absolute right to a fair and impartial as well as an adequate appellate review. It is submitted that the opinions of the Appellate Court and the Supreme Court of Illinois should have been prepared and delivered

by a judge from another judicial circuit or district. If this practice is adopted, the dignity and integrity of the courts will be better preserved and the rights of the accused protected.

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that a rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Supreme Court of Illinois.

Respectfully submitted,

JOHN R. SNIVELY,
Counsel for Petitioner.

Certificate of Counsel.

I hearby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58(2) of this Court.

/s/ John R. Snively,

Counsel for Petitioner.